

**IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

HORIZON HOMES, LTD.

Plaintiff,

v.

**KLM HORIZON DEVELOPMENT, L.L.C.
and KEITH MYRICK**

Defendants.

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CIVIL ACTION NO.

ORIGINAL COMPLAINT

Plaintiff, Horizon Homes, Ltd. (“Horizon Homes”) files this, its Original Complaint against Defendants, KLM Horizon Development, L.L.C. and Keith Myrick (“Defendants”), and would respectfully show the Court the following:

Parties

1. Horizon Homes, Ltd. is a limited partnership organized and existing under the laws of the State of Texas with its principal place of business at 5601 Democracy Drive, Suite 300, Plano, Texas 75024.

2. Defendant, KLM Horizon Development, L.L.C. (“KLM”), is a limited liability company organized and existing under the laws of the State of Texas with a principal place of business at 12603 Highway 105 West, Suite 205, Conroe, Texas 77304-4788. KLM has listed its registered agent for service of process as Keith L. Myrick, 13920 Amber Lane, Montgomery, Texas 77316.

3. Keith Myrick (“Myrick”) is an individual and a resident of the State of Texas. He may be served with process at 13920 Amber Lane, Montgomery, Texas 77316.

Jurisdiction and Venue

4. This Court has subject matter jurisdiction under 28 U.S.C. §§ 1331, 1338(a) and 15 U.S.C. § 1121 because this case arises under the Trademark Act of 1946, *as amended*, 15 U.S.C. § 1051 *et seq.*

5. This Court has jurisdiction over the unfair competition claims under the provisions of 28 U.S.C. § 1338(b), because they are joined with substantial and related claims under the trademark laws of the United States, 15 U.S.C. § 1051 *et seq.* This Court has supplemental jurisdiction over the causes of action which arise under the statutes and common law of the State of Texas pursuant to 28 U.S.C. § 1367(a) because they are so related to the Federal Claims that they form part of the same case or controversy and derive from a common nucleus of operative fact.

6. Defendants are subject to personal jurisdiction in this district because they are deemed to reside in this district and because a substantial part of the events giving rise to the causes of action arose through acts of Defendants committed in this district. Venue lies properly in this judicial district and division under the terms of 28 U.S.C. § 1391(b) and (c) because both Defendants are subject to personal jurisdiction in this district.

Factual Allegations

7. For many years, and since long before the acts of Defendants complained of herein, Horizon Homes has constructed residential homes for sale and offered real estate development and planning services throughout Texas and the United States under the trademarks “HORIZON HOMES®” and “HORIZON HOMES®” and design (collectively, the “HORIZON HOMES® Marks”).

8. Horizon Homes is the owner of Federal Trademark Registration No. 2,856,287 for the mark “HORIZON HOMES[®]” for “construction of residential homes” in Class 37. A copy of the registration is attached as Exhibit A. The Mark was first used in April 2001 and has been used continuously since that date. The registration is valid and subsisting, uncanceled and unrevoked. The registration has become incontestable under 15 U.S.C. § 1065.

9. Horizon Homes is the owner of Federal Trademark Registration No. 3,593,534 for the mark “HORIZON HOMES[®]” and design for “real estate development and planning services; namely development, laying out and constructing individual residences” in Class 37. A copy of the registration is attached as Exhibit B. The Mark was first used in June 2003 and has been used continuously since that date. The registration is valid and subsisting, uncanceled and unrevoked.

10. Prior to the acts of Defendants complained of herein, Horizon Homes has expended a substantial amount of money, energy, time and effort in continuously advertising and promoting the HORIZON HOMES[®] Marks in connection with its services. Horizon Homes continues to advertise and promote its services to the trade and the public.

11. The services sold under the HORIZON HOMES[®] Marks are of consistent premium quality and have become successful in the industry. As a result of the care and skill exercised by Horizon Homes in the conduct of its business, by extensive advertising, and through the continuous marketing of high quality services under the HORIZON HOMES[®] Marks in the residential home construction industry, Horizon Homes has acquired a reputation for high quality.

12. These efforts have also resulted in Horizon Homes being identified in the marketplace as the exclusive source of services bearing the HORIZON HOMES[®] Marks. The HORIZON HOMES[®] Marks have acquired wide notoriety and symbolize the goodwill which

Horizon Homes has created by the sale of high quality services. Consequently, the HORIZON HOMES[®] Marks have acquired extensive secondary meaning and constitute a valuable asset of Horizon Homes. Growth and continuation of Horizon Homes business depends in part upon the unique and distinctive nature of the HORIZON HOMES[®] Marks and on the reputation and goodwill symbolized thereby.

13. Defendants provide the services of residential home design and construction (“Defendants’ Services”). Upon information and belief, Defendants sell and market Defendants’ Services continuously and systematically throughout the United States, Texas and this judicial district.

14. Defendants have adopted the mark “HORIZON HOMES TEXAS” (the “Infringing Mark”) and use it in commerce in connection with the sale, offer for sale, distribution, and advertising of Defendants’ Services.

15. At no time has Horizon Homes authorized or approved Defendants’ sale, offer for sale, distribution, or advertising of Defendants’ Services under the Infringing Mark.

16. Horizon Homes has notified Defendants that their actions constitute trademark infringement and unfair competition. Yet, Defendants have continued to sell their services under the Infringing Mark.

Count I
Federal Trademark Infringement
(15 U.S.C. § 1114(1))

17. Horizon Homes repeats and realleges the allegations of Paragraphs 1 through 16 as if fully set forth herein.

18. Defendants have infringed the HORIZON HOMES[®] Marks in violation of 15 U.S.C. § 1114(1)(a), by conducting various acts without the consent of Horizon Homes,

including use in commerce of a reproduction, counterfeit, copy or colorable imitation of the HORIZON HOMES® Marks in connection with the sale, distribution and advertising of services which is likely to cause confusion, or to cause mistake or to deceive consumers in at least the residential home construction industry.

19. Defendants have also infringed the HORIZON HOMES® Marks in violation of 15 U.S.C. § 1114(1)(b), by conducting various acts without the consent of Horizon Homes, including reproducing, copying, counterfeiting and colorably imitating a registered mark, namely the HORIZON HOMES® Marks, and applying such reproduction, copy, counterfeit and colorable imitation to, *inter alia*, labels, signs, prints, packages and advertisements, used and intended to be used in commerce, upon or in connection with the sale, offering for sale, distribution, or advertising of services in a manner likely to cause confusion, to cause mistake, or to deceive consumers in at least the residential home construction industry.

20. On information and belief, Defendants' acts of trademark infringement are fraudulent, deliberate, willful and malicious, and have been committed with the intent to cause injury to Horizon Homes and its property rights in the HORIZON HOMES® Marks, and to cause confusion, mistake and deception.

Count II
False Designation of Origin
(15 U.S.C. § 1125(a))

21. Horizon Homes repeats and realleges the allegations of Paragraphs 1 through 20 as if fully set forth herein.

22. For many years and since long prior to the acts of the Defendants, Horizon Homes has continuously marketed and sold services in the residential home construction industry under the HORIZON HOMES® Marks.

23. Since long prior to the acts of Defendants, Horizon Homes has expended a substantial amount of money in continuously advertising and promoting the HORIZON HOMES[®] Marks in connection with its services. Horizon Homes continues to advertise and promote its services to the trade and to the public under the HORIZON HOMES[®] Marks.

24. Since long prior to the acts of Defendants, Horizon Homes has acquired a fine reputation because of its uniformly high quality services sold under the HORIZON HOMES[®] Marks and because of its extensive advertising and sales. As a result, Horizon Homes' services associated with the HORIZON HOMES[®] Marks have been and are now recognized by the public and the trade as originating from a single source, namely, Horizon Homes.

25. Because of the inherent distinctiveness of the HORIZON HOMES[®] Marks and/or because the Marks have acquired a secondary significance in the residential home construction industry, the HORIZON HOMES[®] Marks have come to indicate a single source, namely Horizon Homes, for its services.

26. Defendants' acts are in violation of 15 U.S.C. § 1125(a)(1)(A) because Defendants have used a mark in commerce, namely the Infringing Mark, in association with Defendants' Services, which constitutes a false and misleading description of fact and a false or misleading representation of fact and which is likely to cause confusion, mistake, or to deceive as to the affiliation, connection or association of Defendants with Horizon Homes, or as to the origin, sponsorship or approval of Defendants' Services and/or their commercial activities as those of Horizon Homes.

27. Defendants' acts are in violation of 15 U.S.C. § 1125(a)(1)(B) because Defendants have used, in connection with goods or services, in commerce, words, terms, names, symbols and devices and combinations thereof and false, misleading descriptions of fact in

commercial advertising and promotion which misrepresent the nature, characteristics, and qualities of Defendants' Services and/or their commercial activities.

28. On information and belief, Defendants' acts of false designation of origin are fraudulent, deliberate, willful and malicious, and have been committed with the intent to cause injury to Horizon Homes and its property rights in the HORIZON HOMES® Marks, and to cause confusion, mistake and deception.

Count III
Injury to Business Reputation and Dilution
(Tex. Bus. & Com. Code Ann. § 16.103)

29. Horizon Homes repeats and realleges the allegations in Paragraphs 1 through 28 as if fully set forth herein.

30. Beginning at least as early as 2001, Horizon Homes adopted and used the HORIZON HOMES® Marks in association with its services. The HORIZON HOMES® Marks have been used by Horizon Homes or those under its supervision and authority continuously since the date of first use of the trademark.

31. The HORIZON HOMES® Marks are famous and inherently distinctive and/or have acquired distinctiveness throughout this State or a geographic area in this State.

32. Defendants' conduct violates the Texas Trademark Act because Defendants began using a trademark, namely the Infringing Mark, in commerce, after the HORIZON HOMES® Marks became famous, that is likely to dilute the distinctive quality of the HORIZON HOMES® Marks. Specifically, the use of the Infringing Mark is likely to create confusion and induce consumers to believe that the services offered by Defendants are actually those of Horizon Homes somehow associated or connected with them. Moreover, the distinctive quality of the HORIZON HOMES® Marks will be blurred and tarnished through the actions of Defendants.

33. On information and belief, Defendants' actions are fraudulent, deliberate, willful and malicious, and have been committed with the intent to cause injury to Horizon Homes and its property rights in the HORIZON HOMES[®] Marks, and to cause confusion, mistake and deception.

Count IV
Unfair Competition
(Texas Common Law)

34. Horizon Homes repeats and realleges the allegations in Paragraphs 1 through 33 as if fully set forth herein.

35. Horizon Homes has adopted and used the HORIZON HOMES[®] Marks in connection with its services since at least as early as 2001 and has used the trademarks continuously since its date of first use. The HORIZON HOMES[®] Marks identify Horizon Homes as a sole source of services offered by Horizon Homes and distinguish those services from many others.

36. As a result of the care and skill exercised by Horizon Homes in the conduct of its business and particularly in the maintenance of high quality services, by its extensive advertising, and by the extensive and continuous marketing of services throughout the residential home construction industry over many years, the services offered under the HORIZON HOMES[®] Marks have acquired a reputation for high quality. Consumers now recognize the HORIZON HOMES[®] Marks as identifying Horizon Homes exclusively as a source of high quality services. The HORIZON HOMES[®] Marks have acquired wide notoriety and symbolize the goodwill which Horizon Homes has created by the sale of dependable and high quality services. Consequently, the HORIZON HOMES[®] Marks constitute valuable assets of Horizon Homes.

37. Subsequent to the adoption and use of the HORIZON HOMES[®] Marks by Horizon Homes, Defendants began infringing the HORIZON HOMES[®] Marks by advertising and selling services under a trademark and/or a symbol, namely the Infringing Mark, that is confusingly similar to and creates the same commercial impression as the HORIZON HOMES[®] Marks throughout this judicial district and the United States. Under Texas Law, such conduct represents unfair competition and misappropriation and is designed to cause confusion and mistake and to deceive purchasers into believing that Defendants' Services are somehow sponsored by, made by or associated with Horizon Homes.

38. On information and belief, Defendants have attempted to and has passed off Defendants' Services on the public as those of Horizon Homes.

39. On information and belief, Defendants' acts of unfair competition and misappropriation are fraudulent, deliberate, willful and malicious, and have been committed with the intent to cause injury to Horizon Homes and its property rights in the HORIZON HOMES[®] Marks, and to cause confusion, mistake and deception.

Allegations of Damage

40. Because of Defendants' acts as alleged herein, Horizon Homes has suffered and will continue to suffer damage to its business, reputation and goodwill and to endure a loss of sales and profits in an amount yet to be determined.

41. Because of Defendants' acts as alleged herein, Defendant will be unjustly enriched by profits they have made through the sale of services utilizing a trademark that is confusingly similar to the HORIZON HOMES[®] Marks.

42. Because of Defendants' Acts as alleged herein, the HORIZON HOMES[®] Marks will be blurred, tarnished and have their distinctive character diluted.

43. Horizon Homes is suffering, has suffered, and will continue to suffer irreparable harm, for which has no adequate remedy at law, unless Defendants are enjoined from the acts complained of herein.

Demand for Jury Trial

44. Pursuant to Rule 38(b), Fed. R. Civ. P., Horizon Homes demands a jury trial.

Prayer

WHEREFORE, Horizon Homes respectfully requests:

A. That Defendants, their officers, agents, servants, employees, attorneys, confederates and all persons in active concert or participation with any of them, be enjoined immediately and preliminarily during the pendency of this action, and thereafter perpetually from:

i. Using the HORIZON HOMES[®] Marks, or any reproduction, counterfeit, copy or colorable imitation of said marks, including but not limited to the Infringing Mark, in connection with the advertising, offering for sale, or sale of goods or services the same or similar to or associated or connected with those offered by Horizon Homes;

ii. Using the HORIZON HOMES[®] Marks, or any reproduction, counterfeit, copy or colorable imitation of said marks, including but not limited to the Infringing Mark, in any manner likely to cause confusion, to cause mistake or to deceive;

iii. Selling or passing off, inducing, or enabling others to sell or pass off any services used in the residential home construction industry and any other related industries or any other services similar to or associated or connected with those offered by Horizon Homes;

iv. Committing any acts, including, but not limited to marketing and advertising activity, which are likely to cause injury to Horizon Homes' business reputation and/or blur or tarnish the distinctiveness of the HORIZON HOMES® Marks;

v. Committing any acts, including, but not limited to marketing and advertising activities, which are calculated to cause purchasers to believe that Defendants' Services are those of Horizon Homes in whole or in part unless they are entirely such;

vi. Otherwise competing unfairly with Horizon Homes in any manner, including, but not limited to, use of the Infringing Mark;

vii. Destroying, altering, disposing of, concealing, tampering with or in any manner secreting any and all business and electronic records, invoices, correspondence, books of account, receipts or other documentation relating or referring in any manner to the providing, advertising, sale or offer for sale of any goods or services bearing the Infringing Mark or any other trademark which is confusingly similar to the HORIZON HOMES® Marks;

B. That after final hearing, Defendants be required to deliver up for destruction or, alternatively, to obliterate the Infringing Marks on their advertising for Defendants' Services, including but not limited to printed and electronic publications, data files, web pages, advertising material of any kind and any other physical material in its possession, custody or control bearing the Infringing Mark, the HORIZON HOMES® Marks or any other mark confusingly similar thereto;

C. That for the next five (5) years, upon ten (10) days notice, Horizon Homes be permitted to inspect and audit Defendants' advertising and all electronic and business records to determine compliance with the Order issued by the Court;

D. That Defendants be ordered to account and pay over to Horizon Homes all damages sustained by Horizon Homes and profits realized by Defendant by reason of Defendants' unlawful acts alleged herein, that such profits be fully trebled as provided by law because of the willfulness of Defendants' acts;

E. That Horizon Homes be awarded punitive damages in the amount of One Million Dollars (\$1,000,000.00) against Defendants;

F. That Horizon Homes be awarded prejudgment and post-judgment interest;

G. That this case be held to be exceptional and that Horizon Homes be therefore awarded its costs and reasonable attorney's fees; and,

H. That Horizon Homes have such other and further relief as the Court deems just and proper.

Dated: April 9, 2014.

Respectfully submitted,

s/George R. Schultz
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